BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FREDERICK D. FRANKLIN, IV	)	
Claimant	)	
VS.	)	
	)	Docket No. 189,424
DICK EDWARDS FORD	)	
Respondent	)	
AND	)	
	)	
UNIVERSAL UNDERWRITERS INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent appealed the October 24, 1996, Award entered by Special Administrative Law Judge William F. Morrissey.

APPEARANCES

Claimant appeared by and through his attorney, Frank D. Taff of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Gary R. Terrill of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent requested Appeals Board review of the same issues that were before the Special Administrative Law Judge for decision:

(1) The nature and extent of claimant's disability.

(2) Whether the claimant is entitled to additional temporary total compensation from May 2, 1995, through June 2, 1995.

(3) Whether the claimant is entitled to future medical compensation.

(4) Whether claimant is entitled to the unauthorized medical expense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

(1) The Special Administrative Law Judge found claimant was entitled to permanent partial disability benefits of 52 percent based on the work disability test contained in K.S.A. 1992 Supp. 44-510e(a). Respondent appeals and argues that the claimant is limited to permanent partial disability benefits based on his functional impairment.

Claimant injured his left shoulder on November 20, 1992, while working for the respondent. Respondent provided claimant with medical treatment for his shoulder injury through Orthopaedic and Sports Medicine Clinic of Kansas City, P.A. After a regimen of conservative treatment, orthopedic surgeon Cris D. Barnthouse, M.D., on September 7, 1994, performed a resection of the AC joint of claimant's left shoulder. Dr. Barnthouse released claimant to return to work on February 1, 1995, with permanent restrictions and a permanent functional impairment rating of 15 percent to the left shoulder. At the time the regular hearing was held on November 22, 1995, claimant had been discharged from his employment with respondent and remained unemployed.

Because the parties failed to stipulate to a functional impairment rating, the Special Administrative Law Judge appointed Peter V. Bieri, M.D., to perform an independent medical examination of the claimant. Dr. Bieri's deposition testimony was not taken as the parties stipulated into evidence Dr. Bieri's independent medical examination report. Dr. Bieri assessed claimant with the same 15 percent permanent functional rating of the left shoulder as did claimant's treating physician, Dr. Barnthouse. This 15 percent functional impairment rating of the shoulder was converted into a 9 percent whole body rating by Dr. Bieri.

The claimant was interviewed and evaluated by two vocational rehabilitation experts, Bud D. Langston on behalf of the claimant and Dick Santner on behalf of the respondent. Both experts utilized Dr. Barnthouse's permanent restrictions for the purpose of formulating their respective opinions on claimant's loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage, the two components of the work disability test contained in K.S.A. 1992 Supp. 44-510e(a). Dr. Barnthouse's restrictions

were set out specifically in both of the experts' evaluation reports. Also, both of the experts' evaluation reports were admitted into evidence at their respective depositions without a timely objection from either party. Additionally, both of the experts were subject to cross-examination by the opposing party.

Respondent argues that claimant's entitlement to permanent partial disability benefits is limited to his permanent functional impairment rating because the evidentiary record does not contain the deposition testimony of claimant's treating physician, Dr. Barnthouse. Respondent points out that the only medical evidence contained in the record is the independent medical examination report of Dr. Bieri that was stipulated into the record by the parties. Respondent contends that the provisions of K.S.A. 44-519 and K.A.R. 51-3-5a require the deposition testimony of the physician or a stipulation of the parties before medical records or reports are admissible.

Respondent further asserts that claimant's evidence on the issue of work disability as determined by claimant's vocational expert, Mr. Langston, lacks foundation and is thus inadmissable because his opinion was based only on Dr. Barnthouse's permanent restrictions. Accordingly, the respondent contends that Dr. Barnthouse's permanent restrictions are not a part of the record of this case because the doctor's deposition testimony was not taken by the claimant.

Dr. Barnthouse's medical records were admitted into evidence at the preliminary hearings held in this case on June 30, 1994, and March 3, 1995. At the regular hearing, the parties stipulated that these preliminary hearing transcripts were part of the evidentiary record for the purpose of consideration for the final award. However, K.A.R. 51-3-5a provides that the medical records admitted at the preliminary hearing are not part of the record for the purpose of the final award unless all parties stipulate to their admission. Further, K.S.A. 44-519 requires testimony of the physician before the physician's medical reports or records are admitted as evidence in the record of a workers compensation proceeding.

The respondent did not raise the issue concerning the admissibility of the vocational rehabilitation experts opinions based on Dr. Barnthouse's restrictions until the respondent submitted its case for decision to the Administrative Law Judge. At that time, both the claimant's and the respondent's terminal dates for submission of evidence had expired.

The Appeals Board agrees with the respondent's argument that without the stipulation of the parties the medical records and reports placed into evidence at a preliminary hearing are not admissible for the purpose of the final award. However, the Appeals Board concludes that respondent was required to make a timely objection during the deposition testimony of claimant's vocational expert, Mr. Langston, in order to exclude his opinion on claimant's work disability based on Dr. Barnthouse's permanent restrictions. The Appeals Board finds that the respondent cannot sit back and wait until he has submitted his case to then object to the admission of evidence.

Although the rules of evidence are not strictly applied in workers compensation cases, the Appeals Board finds that the longstanding "contemporaneous objection rule" applies to a workers compensation case. Accordingly, a party waives the right to complain that evidence was erroneously introduced unless a timely objection is made in the record making clear the grounds of the objection. *See* Anderson v. Scheffler, 248 Kan. 736, Syl. ¶ 5, 811 P.2d 1125 (1991) and State v. Carter, 220 Kan. 16, Syl. ¶ 2, 551 P.2d 821 (1976).

The Special Administrative Law Judge also found claimant's evidence on work disability admissible. The Appeals Board affirms the Special Administrative Law Judge's Award entitling claimant to a 52 percent work disability.

(2) The parties stipulated that claimant was paid 62 weeks of temporary total disability compensation and $110.65 of temporary partial disability compensation. Claimant also made a further claim for 4.71 weeks of temporary total disability compensation for the period from May 2, 1995, through June 2, 1995. The Special Administrative Law Judge found claimant was entitled to those weeks of temporary total disability compensation based on a medical report placed into evidence at the preliminary hearing held on August 2, 1995. The Appeals Board finds that K.A.R. 51-3-5a specifically excludes medical evidence introduced at the preliminary hearing unless stipulated by the parties as admissible for the purpose of the final award. The Appeals Board finds that Dr. Barnthouse's medical report dated June 2, 1995, that supported claimant's claim for temporary total disability benefits was not stipulated into evidence for purpose of the final award. Claimant, without the admission of that report into evidence, failed to otherwise prove he was temporarily and totally disabled for the 4.71 weeks in question.

(3) The Special Administrative Law Judge also awarded claimant future medical benefits upon proper application to and upon the approval of the Director. The respondent argued that Dr. Bieri's independent medical report indicated that claimant had no further recommendations for medical treatment for claimant's injury. The Appeals Board finds that the Special Administrative Law Judge properly awarded claimant future medical treatment upon proper application and approval of the Director. Claimant is required to prove reasonableness of any future medical expense. *See* K.S.A. 1992 Supp. 44-510. Therefore, no hardship is placed on the respondent because the respondent has the opportunity to oppose such a request before the Administrative Law Judge. *See* Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 983, 911 P.2d 198 (1996), *rev. denied* 260 Kan. ___ (1996).

(4) Neither during oral argument before the Appeals Board nor in its brief, did the respondent express a reason why the claimant was not eligible for the statutory unauthorized medical expense. Therefore, the Appeals Board affirms the Special Administrative Law Judge's finding that claimant is eligible for the $350 unauthorized medical expense upon proper presentation of the expense.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey dated October 24, 1996, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Frederick D. Franklin, IV, and against the respondent, Dick Edwards Ford, and its insurance carrier, Universal Underwriters Insurance Company, for an accidental injury which occurred November 22, 1992, and based upon an average weekly wage of $365.63.

Claimant is entitled to 62.45 weeks of temporary total disability compensation at the rate of $243.77 per week or $15,223.44, followed by 352.55 weeks at the rate of $126.76 per week or $44,689.24, for a 52% permanent partial disability, making a total award of $59,912.68.

As of August 31, 1997, there is due and owing claimant 62.45 weeks of temporary total disability compensation at the rate of $243.77 per week or $15,223.44, followed by 186.55 weeks of permanent partial compensation at the rate of $126.76 per week in the sum of $23,647.08 for a total of $38,870.52, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $21,042.16 is to be paid for 166 weeks at the rate of $126.76 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frank D. Taff, Topeka, KS
Gary R. Terrill, Overland Park, KS
William F. Morrissey, Special Administrative Law Judge
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director